82-42

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as individuals, and MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as Trustees of the LOUISE V. STOVER TRUST,

Petitioners,

v.

WALGREEN CO., an Illinois corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTIONS PRESENTED FOR REVIEW

1. Does a state supreme court's refusal to give effect to a jurisdictionally valid state administrative order violate the petitioners' right to due process of law where:

a. The administrative order became final without a hearing because the respondent waived its right to review of the order and the order was relied upon by the petitioner; and

b. There was no record evidence from which the state supreme court could legitimately draw the factual conclusions upon which its decision was based.

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OPINIONS BELOW

The trial court's opinion is not officially reported. The Journal Entry of Judgment issued by the trial court is contained in the Appendix to this Petition (1a-15a). The decision of the Kansas Court of Appeals is reported at 6 Kan. App. 2d 505, 630 P.2d 1185 (1981) and is reproduced in the Appendix (16a-43a). The decision of the Kansas Supreme Court is reported at 230 Kan. 443, 638 P.2d 898 (1982) and is reproduced in the Appendix (44a-54a).

JURISDICTION

The decision of the Kansas Supreme Court was entered on January 15, 1982. That decision relied on facts outside the record, thereby denying the petitioners their right to due process of law under the Fourteenth Amendment to the United States Constitution. The denial of the right to due process of law was raised in a timely motion for rehearing to the Supreme Court of Kansas, which was denied on February 25, 1982. On May 15, 1982, Mr. Justice White entered an order extending time to file this petition for a writ of certiorari to and including July 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, Mary Dolores Baca and Susan Robertson Gerard, individually and as trustees for the Louise V. Stover Trust ("trustees"), are the owners of property located in downtown Topeka, Kansas (App. 1a).[1] The respondent, Wal-

[1] The facts contained in this section are taken from the findings of the trial court as expressed in the Journal Entry of Judgment and from the decisions of the Kansas Court of Appeals and the Kansas Supreme Court. The pages of the appendix to this petition at which the facts, as stated, appear are indicated for the Court's convenience.

green Co., leases the property and operates a drug store on the property. A written lease governs the relationship of the trustees as landlord and Walgreen as tenant (App. 2a).

Under the terms of Articles 4 and 9 of the lease, Walgreen is required to make all necessary repairs and changes occasioned by its use of the property and required by public authorities. The lease, in pertinent part, provides as follows (App. 17a):

> 4. . . . Tenant shall comply with the valid requirements of public authorities regarding the manner of the conduct of Tenant's business in the leased premises . . . .
>
> 9. Tenant may install and operate interior and exterior electric and other signs, soda fountain machinery and any other mechanical equipment, and in so doing, shall comply with all lawful requirements.

Acting in accordance with their statutory authority under the Kansas Fire Protection Code, KAN. STAT. ANN. § 31-139, representatives of the Topeka Fire Department, Fire Prevention Bureau and the Kansas State Fire Marshal Department (hereinafter jointly referred to as the "fire officials") inspected the Walgreen store on October 12, 1978 (App. 9a). Walgreen cooperated in this inspection and received the fire marshal's order.[2] The fire marshal's order stated that Walgreen was in violation of both the Kansas statutes governing fire safety and certain fire safety administrative regulations promulgated thereunder (App. 9a).[3] The order required that Walgreen install certain approved fire extinguishing equipment within 30 days.

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[2] The Kansas State Fire Marshal Department and the Topeka Fire Department, Fire Prevention Bureau issued a joint report of violations. It will be referred to as the "fire marshal's order."

[3] The applicable statute is KAN. STAT. ANN. § 31-133 which gives the state fire marshal authority to adopt administrative regulations. Pursuant to that authority, Kansas Administrative Regulation § 22-13-4 was promulgated, which provides as follows:

> Automatic extinguishing systems. In addition to the provisions of 22-13-3, all facilities maintaining commercial cooking equipment shall have approved automatic extinguishers mounted in the

(Footnote continued on following page)

The Kansas Fire Protection Code, KAN. STAT. ANN. §§ 31-132 *et seq.* ("Fire Code"), which authorizes fire safety inspections also provides a 10-day period within which an administrative hearing concerning a fire marshal's order can be requested.[4] In addition, the Fire Code provides for subsequent judicial review.[5] Walgreen did not avail itself of these administrative procedures and 10 days after the fire marshal's order was issued it became final. Walgreen has never challenged the fire marshal's order in accordanee with the procedures contained in the Fire Code.

(Footnote continued from preceding page)

ventilation canopies or directly above such equipment. All equipment must bear the underwriters' laboratories label and be of an approved type extinguishing agent such as CO_2 or dry chemical. Before any extinguishing system can be accepted it must first meet the approval of the Kansas state fire marshal. *Provided, however,* the authority having jurisdiction may exempt a facility from the requirements of this section, if, in his opinion, the waiving of this requirement would not present a definite life safety hazard.

[4] The relevant statute provides as follows:

Any person aggrieved by any order or ruling issued pursuant to the provisions of this act may appeal such order or ruling to the state fire marshal within ten (10) days from the date of the service of such order by filing a notice of such appeal in the office of the state fire marshal. The state fire marshal or his authorized representative shall hear such person within thirty (30) days after the receipt of such notice of appeal, and the state fire marshal shall give not less than ten (10) days' written notice of the hearing which shall be held in accordance with K.S.A. 31-141. Within fifteen (15) days after such hearing, the state fire marshal shall file his decision thereon and, unless by his authority the order is revoked or modified, the order shall be complied with within the time fixed in his decision.

KAN. STAT. ANN. § 31-140

[5] The relevant statute provides as follows:

Within thirty (30) days after the rendition of a decision in any such hearing by the state fire marshal, any person affected thereby may apply to the district court of the county in which the order is to become effective for a review of such order or decision.

(Footnote continued on following page)

Although Walgreen did not seek administrative review of the fire marshal's order, it failed to comply with that order.[6] The trustees, relying on the validity of that order, then brought an action in the Kansas State District Court claiming that Walgreen had breached Articles 4 and 9 of its lease. The trustees sought to enforce the terms of the lease, which gave the trustees the right to protect their property by recovering possession of the property from Walgreen (App. 12a, 17a-18a). No question of an exemption from the effects of the fire marshal's order was raised at the trial of this action. Nor was evidence concerning an exemption from the effects of the fire marshal's order presented. Since the fire marshal's order had become final, the question of an exemption from the effects of the order was not at issue in the case. Both the trial court and the Kansas Court of Appeals held that the fire marshal's order was a valid requirement of a public authority and that under the lease, Walgreen was required to comply (App. 12a, 29a-30a).[7]

(Footnote continued from preceding page)

> If the order of the state fire marshal is to become effective in more than one county, the application must be made to the district court of one of such counties. The application for review shall be filed in the office of the clerk of the district court of the proper county, and it shall specifically state the grounds for review upon which the applicant relies and shall designate the order or decision sought to be reviewed. Notice of such appeal shall be given in the manner provided in K.S.A. 60-2101, and any amendments thereto.

KAN. STAT. ANN. § 31-142

[6] Walgreen did eventually install the equipment, but not within the 30-day period specified in the fire marshal's order and not until it had caused the cancellation of the trustees' fire insurance.

[7] The trial court held that under the lease, Walgreen was required to install the fire prevention devices after the fire officials issued their report. However, the court did not award the trustees the requested relief because it held that they failed to give Walgreen 30 days' notice of the default after the fire marshal's order was issued (App. 13a).

The Kansas Supreme Court reversed, and based on evidence outside of the record, rendered the fire marshal's order ineffective. The court did not challenge the statutory authority to issue the fire marshal's order (App. 49a). The court upheld the finding of the trial court and the Kansas Court of Appeals that the obligation to install fire prevention devices was Walgreen's and not the trustees' (App. 51a). But the Kansas Supreme Court held that Walgreen was not in violation of the fire protection regulation and therefore had not breached the lease. To reach this result, the court cited to the Kansas Administrative Regulations § 22-13-32, which provides:

> *Retroactivity.* The regulations contained in the foregoing sections shall allow facilities in service prior to the effective date of such regulations, and not in strict conformity therewith, to continue in service so long as such facilities are not determined by the authority having jurisdiction to constitute a distinct hazard to life or property.

Kansas Administrative Regulations § 22-13-32.

Then, without record evidence, the supreme court determined that Walgreen was entitled to an exemption because the fire marshal's order failed to consider the potential hazard to life or property of the Walgreen facilities.[8] The absence of proper record evidence was a result of Walgreen's affirmative decision to waive administrative challenge to the fire marshal's order and to accept the fire marshal's order as final.

After the Kansas Supreme Court rendered its decision, the trustees filed a motion for rehearing which raised the violations of the trustees' right to due process of law.

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[8] At the trial, testimony was elicited that one of the inspectors, Mr. Dibbern, considered Walgreen's failure to have dry fire extinguishing systems installed in the hood over the cooking surfaces a hazard to property (App. 50a).

REASONS WHY THE WRIT SHOULD BE ALLOWED

I. THE KANSAS SUPREME COURT IMPROPERLY SET ASIDE A VALID ADMINISTRATIVE ORDER BY MAKING AN INDEPENDENT DETERMINATION BASED NOT ON RECORD EVIDENCE BUT ON SPECULATION ABOUT FACTS THAT MIGHT HAVE BEEN ADDUCED AT A HEARING THAT WAS NEVER REQUESTED.

The Kansas statutes provide a procedure for determining whether a business is complying with the regulations of the state fire marshal. The statute contemplates that the state fire marshal will make an inspection, will issue findings of violations, KAN. STAT. ANN. § 31-139, and will determine whether certain business should be exempt from the regulations. KAN. STAT. ANN. § 31-133(c). These orders and rulings are subject to review by the State Fire Marshal Department at the request of any aggrieved person. KAN. STAT. ANN. § 31-140. The statute providing for review contemplates a full hearing with the opportunity to present evidence and cross-examine witnesses. KAN. STAT. ANN. § 31-141.

In this case, the fire officials made their inspection and the fire marshal's order cited Walgreen for violation of the regulation requiring certain fire protection devices for cooking surfaces in commercial establishments. Walgreen chose not to seek review of this order or seek exemption from the regulation. Nor did Walgreen comply promptly with the order as required by the Kansas statute and by the terms of its lease.

The trustees were also afforded certain procedural rights under the Fire Code. Had the fire marshal exempted Walgreen's cooking appliances from the regulation, the trustees could have sought a hearing before the fire marshal in which they could have presented evidence that Walgreen did not qualify for the exemption. The trustees, however, agreed with the fire marshal's determination that the fire prevention devices

should be installed, and therefore did not seek any hearing. Thus, the fire marshal's order became final and the trustees relied upon it to protect their property.

When Walgreen refused to comply with the fire marshal's order, the trustees filed a lawsuit seeking to recover possession of the property. Both the trial court and the Kansas Court of Appeals held that the report of the fire officials was the valid requirement of a lawful authority, (App. 12a, 24a) and that Walgreen was required by the lease to comply with that requirement. When the lawsuit reached the Kansas Supreme Court on appeal, the court refused to give effect to the final order of the Kansas State Fire Marshal Department.

The court based its refusal to enforce the order on speculation that the fire officials, who cited Walgreen for failure to comply with proper regulations, may not have been aware of an exemption that might have been available to Walgreen. However, Walgreen's right to an exemption was not at issue in the case. Therefore, there was no basis in the record for any factual determination concerning an exemption, nor could there be, because the validity of the administrative order was not properly before the court. Walgreen had waived its right to an administrative hearing and the evidence, which would have been considered by the Kansas State Fire Marshal Department in the context of the hearing, was never developed. Nonetheless, the Kansas Supreme Court speculated about what evidence might have been introduced in that hearing and what the result of that unknown evidence would be. In so doing, the Kansas Supreme Court violated the trustees' right to due process of law.

II. THE ACTION OF THE SUPREME COURT IN DISREGARDING AN ADMINISTRATIVE ORDER WITHOUT BENEFIT OF RECORD EVIDENCE DEPRIVED THE TRUSTEES OF DUE PROCESS OF LAW.

The trustees have a contract right, under the express terms of the lease, to have Walgreen comply with the regulations of state authorities. Contract rights are afforded protection by this Court. The Court has recognized that persons have a liberty interest in their freedom to enter into contracts. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). And, of course, contract rights are a form of property. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, (1977). Therefore, under the Fourteenth Amendment, a state cannot deprive a person of his contract rights without due process of law.

This Court has held that an administrator cannot deprive a person of liberty or property rights based on facts outside the record of the proceeding. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937), this Court reversed the order of an administrator which was based on facts outside the record. The Court recognized that the effect of deciding a case on facts not presented in the record is to deprive the affected party of a hearing. As the Court stated "a hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *Id.* at 304. The Court specifically held that such a decision violated the party's right not to be deprived of property without a fair hearing which is the minimum requirement of due process of law.

Moreover, in *Ohio Bell* this Court pointed out that the Ohio Supreme Court's affirmation of an improper administrative order was equally a violation of due process of law:

> In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more

> concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?

Id. at 303.

This Court has frequently admonished federal courts against justifying or overturning administrative determinations based on the reviewing court's inferences concerning evidence. In *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976), this Court overruled an attempt by the Court of Appeals for the District of Columbia to make an independent factual determination in a proceeding to review an agency order. The Court stated that:

> ordinarily review of administrative decisions is to be confined to "consideration of the decision of the agency . . . and of the evidence on which it was based." *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 714-715 (1963). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).

423 U.S. at 331.

The Kansas Supreme Court has likewise adopted standards for reviewing administrative actions which prohibit a reviewing court from substituting its own judgment for that of the agency. In *Robert E. Esrey & Co.* v. *Dibbern*, 228 Kan. 784, 620 P.2d 827 (1980), the Kansas Supreme Court, in reviewing an order of the state fire marshal, held:

> This court's scope of review is the same as the district court's when an administrative tribunal's order is on appeal. On appeal, the court may not substitute its judgment for that of the administrative tribunal, but is restricted to considering whether as a matter of law:

(1) The tribunal acted fraudulently, arbitrarily or capriciously;

(2) The order is substantially supported by evidence, and

(3) The tribunal's action was within the scope of its authority.

228 Kan. at 789[9]

Neither the trustee nor Walgreen had sought review of the fire marshal's order. Nonetheless, the Kansas Supreme Court, disregarding its own precedent concerning the scope of administrative review, reversed the state fire marshal's determination that Walgreen violated the regulation requiring fire extinguishing devices. The supreme court's decision was based on the court's speculation that the fire officials were unaware that Walgreen may have been able to obtain an exemption from the regulation. The availability of an exemption was a purely factual issue to be determined in a proceeding before the Kansas State Fire Marshal Department. Moreover, there was nothing in the record indicating that Walgreen's facilities did not constitute a hazard to life or property, precluding the exemption.

The reason that the record is devoid of these facts is that the possibility of an exemption was never raised by Walgreen

[9] The Kansas Supreme Court's failure to follow its own standards for review of an administrative order may be, in part, a result of the court's consideration of matters *de hors* the record in deciding the case. As the Bystander's Affidavit of John Wilkinson, counsel for the trustee, demonstrates, during oral argument the Kansas Supreme Court expressed concern about the economic effect on downtown Topeka, should Walgreen lose the case. The Bystander's Affidavit is included in the Appendix to this petition (App. 55a). One of the justices, Justice Fromme, specifically asked Mr. Wilkinson whether, if the lease was terminated, Walgreen might not leave downtown Topeka (App. 56a). After oral argument, the trustees filed affidavits seeking to disqualify Justice Fromme based on his prejudicial remarks. That motion was denied.

before the appropriate administrative body, the Kansas State Fire Marshal Department. Had the issue been raised, and had Walgreen been granted the exemption, the trustees would have had a right to a hearing as to whether the exemption was proper. These factual issues could then have been determined, as contemplated by the statute, in the appropriate administrative setting. By reaching a decision adverse to the trustees, based only on the court's speculation as to the fire officials' intentions and knowledge, the Kansas Supreme Court deprived the trustees of their right to a hearing and to due process of law.

While the precise question presented by the instant matter has not yet been addressed by this Court, the logic of *Ohio Bell* is controlling. *Ohio Bell* holds that it is a violation of due process of law for both a state supreme court and an administrative agency to make a determination affecting property rights based on judicial notice of facts not presented as evidence. It is equally a violation of due process of law for a state supreme court to refuse to give effect to an administrative order and to base that refusal on speculation about facts that might have been presented at a hearing that was never held. To base a refusal to enforce an administrative order affecting the trustee's property rights on speculation is more than poor judicial practice. In effect, allowing such a practice strikes at the very heart of the *Ohio Bell* holding and renders the *Ohio Bell* decision meaningless. Under this Court's decisions in *Goldberg* and *Ohio Bell*, such a practice is a violation of due process of law.

CONCLUSION

For the foregoing reasons the petitioners respectfully submit that this Court should grant their Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas and reverse that court's decision.

Respectfully submitted,

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